



STATE OF WASHINGTON
WASHINGTON STATE BOARD OF HEALTH
*1102 SE Quince Street • PO Box 47990
Olympia, Washington 98504-7990*

May 14, 2003

TO: State Board of Health Members

FROM: Craig McLaughlin, Senior Health Policy Manager

RE: **AUTHORITY FOR VECTOR CONTROL ON PRIVATE LANDS**

Background and Summary

At its April meeting, the Board heard an update about the public health response to West Nile virus (WNV) in Washington. It included a brief discussion about whether—in light of strong constitutional protections against invasion of privacy and unlawful search and seizure—state and local public health officials had authority to enter private lands to conduct mosquito abatement. At the end of that presentation, Chair Linda Lake said the Board would be interested in continuing the discussion at a future meeting.

In light of that discussion, I was asked to prepare a memo addressing:

- What authority exists for public health agencies to control and abate mosquitoes on private land without consent in order to control human exposure to WNV?
- What legal issues might prevent public health agencies from controlling and abating mosquitoes on private land without consent?
- What policy options might be considered should it be deemed essential that public health officials be able to control and abate mosquitoes on private land without consent?

In summary, public health activities are part of the fundamental police powers of government, which have been recognized since the advent of modern systems of governance. Public health agencies also have authority to control the spread of disease, abate nuisances, and conduct vector control. The courts have interpreted these authorities broadly, but they are not absolute and must be viewed through an overlay of case law that examines these authorities in the context of competing rights and authorities.

The competing right in question is the right to privacy afforded by the federal and state constitutions. Numerous legal decisions have explored the confluence between police power, nuisance abatement, and property rights. The courts have determined that entry onto private property for purposes of nuisance abatement (a category of activity that typically encompasses vector control) requires the owners' consent or a warrant, except under exigent or emergency circumstances or when there is a compelling government interest. The Catch-22 is that public health may not have standing to seek an administrative warrant. Additionally, the valid exercise of police power requires that substantive due process be provided.

Should it be deemed that having the ability to abate mosquitoes on private land over the objections of an uncooperative property owner will have a significant impact on human morbidity and mortality from WNV, there are several policy options the Board might wish to consider, including promulgating new rule under its authority to control the spread of animal-borne diseases.

There may be a broader issue at stake here. Property rights is a complex, volatile, contentious, and increasingly politicized area of law. It is also an area that could—given the current civil, political, and judicial climates—impinge on public health’s ability to control the spread of disease. Various experts on public health law have argued that too many of the laws that form the basis of public health authority are antiquated, vague, and may not meet modern tests of constitutionality. The Board has already dealt with this issue in the context of isolation and quarantine, where it adopted rules describing when isolation and quarantine authority can be used and establishing substantive due process. The Board may wish to consider conducting a more thorough review of vector control authority and recommending ways to modernize statutes and/or rules to resist erosion of longstanding public health authority.

When reviewing this memorandum, please note that it is an initial review by a policy analyst who is somewhat familiar with public health law but who is not an attorney. While the Board’s legal counsel had an opportunity to comment on a draft, this memorandum does not constitute a legal opinion.

Recommended Board Action

None at this time. The Board may wish to consider future action in the context of setting priorities for 2003-05.

Discussion

What statutory authority exists for public health agencies to abate mosquitoes on private lands in order to control human exposure to WNV?

- State and local governments have police power, which allows for government action to promote public health, as well as peace, safety, and general welfare.
- The Secretary of Health has broad authority to make inspections, investigations, and determinations about the health risk posed by mosquitoes and to provide for control and elimination to the extent funds are available (RCW 70.22.020). The Secretary may “do any and all other things necessary to carry out the purpose of this chapter” except injure or kill game or fish (RCW 70.22.050(5)).
- A specific power of the secretary is to “abate as nuisances breeding places for mosquitoes as defined in RCW 17.28.170” (RCW 70.22.050(1)). The abatement authority in RCW 17.28.170, part of the mosquito control district (MCD) statute, is specific to land where breeding places exist because of a use of, or artificial change to, the land that is contrary to normal, accepted practices and is within the control of the owner.
- The MCD statute provides a framework that may make a warrant unnecessary. The first procedural step is to establish that mosquito control and abatement are the responsibility of the property owner. MCD employees may enter the property for enforcement only after the

owner as failed to take adequate control measures and a 24-hour written notice has been given.

- The Secretary has statutory authority providing “free and unimpeded” access to private property to investigate matters “injurious to the public health.” (RCW 43.70.170). This authority, however, does not make any provision for abatement.
- The State Board of Health’s authorizing statute says that the Board shall “[a]dopt rules for the prevention and control of infectious and noninfectious diseases, including...vector borne illness.” (RCW 43.20.050(2)(e)). Existing Board rules address importation of animal products from animals infected with anthrax, sale of turtles (salmonella), importation of animals that might carry rabies, and the destroying and testing of possibly rabid animals (WAC 246-100-191). Board communicable disease rules do not contain general language regulating vector control, nor do they address other known vectors such as mosquitoes (WNV), rats (plague), fowl (avian flu), or mice (hantavirus).
- Local health jurisdictions (LHJs)—local boards and health officers—have no specific statutory authority to control mosquitoes or to enter private land. They do, however, have broad authority to protect the public health (Chapter 70.05 RCW), and the courts have interpreted that authority broadly. Local health officers have statutory authority to “[p]revent, control or abate nuisances which are detrimental to the public health” (RCW 70.05.070(5)) as well as authority and responsibility to conduct vector control measures under Board rule (WAC 246-100-036).
- The state’s Nuisances statute provides for abatement of public and private nuisances and the definition of nuisance includes “an act, or admitting to perform a duty, which...injures or endangers...the health and safety of others.” There are various provisions for the courts to issue a warrant for abatement in the context of criminal or civil action. (Chapter 7.48 RCW)

What legal issues might prevent public health officials controlling and abating mosquitoes on private lands without consent?

- The U.S. Constitution’s Fourth Amendment guarantees, “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.”
- The State Constitution, Article I, Section 7, states, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”
- There is no blanket supremacy afforded any constitutional protections—including those of privacy.
- The courts have repeatedly interpreted privacy and property protections to apply to administrative inspections, including health inspections, and to nuisance abatement. Most of the court cases that inform this memo were specific to inspections or to abating nuisances that did not pose an imminent threat to human health. Abating a known animal vector in the face of an imminent threat to human health may be a different class of activity. More research should be conducted on this issue.
- Intrusion onto private property generally requires a warrant or the consent of the owner. Exceptions exist for exigent circumstances (an urgent situation requiring immediate action such that it is impractical to obtain a search warrant), emergencies, or compelling government interests.
- Public health agencies have no standing in state statute or court rule to seek an administrative warrant to enter private property. On a county-by-county basis, a local health jurisdiction may be able to seek a warrant under local authority.

- The courts give great weight to privacy, but they have also repeatedly upheld the government's compelling interest in protecting the public from disease. If a public health agency entered private property to abate mosquitoes without consent or a warrant, and the property owner sued, the courts might consider a variety of contextual issues: How severe is the threat to the public's health? How urgent the circumstances? How dire the emergency? How compelling the government interest? The courts would also want to see that substantive due process was afforded the property owner.
- There are reasons to question whether the West Nile virus situation would meet the tests for warrantless entry at this time:
 - No human cases of WNV have been identified in Washington State.
 - The mortality rate for WNV in humans is relatively low.
 - Extensive abatement efforts such as pesticide spraying or draining of wetlands are contraindicated; they would reduce the populations of mosquito predators.
 - It would be in the interest of most property owners to cooperate.
 - Mosquito breeding grounds are plentiful and the source of mosquitoes can rarely be attributed to a particular property.
 - It is not clear that abatement activities require such prompt action that there would be no time to secure a warrant.
- Statutes conferring broad public health powers on local governments are nearly a century old. The DOH mosquito control chapter was created in 1961 (the Legislature transferred the duties from DSHS to DOH in 1989). The chapter authorizing mosquito control districts dates from 1957. They have not been updated to reflect more recent court rulings and could be subject to challenge on constitutional grounds.
- There could be government liability associated with the exercise of existing public health authority on private property. Some would argue that the evolving area of "Takings" law, which is based on constitutional protections, means that jurisdictions that control and abate vectors on private lands could be held responsible for losses incurred by the property owner as a result of government actions.
- Many LHJs currently operate under the assumption that they do not have authority to enter private property without permission in most instances. If they cannot receive permission to inspect a drain field, for instance, they may choose to go to an adjacent property and test soils and waters downslope. Clearly there would be exceptions—a commercial facility that the local health officer believes to be contaminated with anthrax might be one example.

What policy options might be considered should it be deemed essential that public health officials be able to control and abate mosquitoes on private land without consent?

Should public health leadership, the Legislature, the Board, the Governor or the populace determine, after full consideration of what we know about WNV, that we must have the capability of controlling mosquitoes on private land, even without the owner's consent, several options could be considered:

- The Governor could declare a public health emergency and steps could be taken under authority of the Governor's emergency powers.
- The Legislature could authorize public health officials to seek administrative warrants from the court.
- LHJs could rely on the powers of the Secretary under Chapter 70.22 RCW (the secretary may act locally when local health officers are unable to act for reasons beyond their control). The Secretary would be advised to follow the procedures established in the MCD statute and first declare the property owner responsible for control and abatement. In the event of a legal challenge, the courts would decide whether these procedures provide adequate protection.
- The Legislature could strengthen the authority of the Secretary by specifically authorizing expenditures for mosquito abatement under Chapter 70.22 RCW.
- The Legislature could strengthen the authority of the Secretary by incorporating the full MCD procedural process (or an enhanced version of it) into Chapter 70.22 RCW—specifically or by reference—and clarifying that the purpose would be vector control in the face of a disease threat, rather than nuisance abatement.
- LHJs could act under their existing police power and statutory authority to protect the public health, assuming the risk that their actions could be challenged in court and that the property owner might argue for reimbursement for losses under the Takings Clause.
- LHJs could work with prosecuting attorneys, owners of adjacent properties, and sheriffs to seek and enforce abatement warrants under Chapter 7.48 RCW. (The Legislature may want to strengthen and clarify health-related wording in the section that enumerates public nuisances (RCW 7.48.140).
- The Board could establish rules under its vector control authority that provide standards and processes for LHJs seeking to enter private property without consent. These rules could be modeled after the MCD statute, but would need to meet modern judicial expectations for substantive due process.

Whatever actions are taken should be carefully considered in light of scientific evidence about the spread of West Nile virus in people.

Careful thought should also be given to the authorizing environment. During the 2003 regular session, the Legislature considered a bill that would have prohibited state employees outright from entering private property without permission. Although it did not pass, there was clearly interest on the part of many legislators. Similarly, some LHJs report that elected officials on local boards of health are opposed to any government intrusion on private property. The courts have shown an increasing willingness to consider "property absolutism."

At the same time, public concern about the threat of WNV virus is very high, and the populace may demand swift, strong and intrusive measures from its state and local governments if an outbreak occurs. In such a circumstance, many of the options listed above may not be possible to pursue in a timely way.

Finally, the Board and other policy bodies might want to think broadly about vector control in general, rather than focus specifically on WNV or mosquito control. Entry onto private property without consent may not be necessary in the context of WNV, but it may prove to be critical in the event of an outbreak of some other new or re-emerging animal-borne disease. Some would also argue that the practice of promulgating specific rules or statutes in response to individual diseases might eventually undermine the ability to use broad authorities to respond to diseases that aren't addressed in statute or in rule.

The question of mosquito control on private land may provide another example, much like isolation and quarantine, where public health law has become eroded because it has not kept up with modern case law. The Board may wish to study the issue of vector control authority further, possibly with the assistance of an advisory committee that comprises various stakeholders. It may be appropriate for the Board to consider the potential of this project during its July discussion about priorities for the 2003-05 biennium.